No. 15006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.

There Was No Implied Denial of Appellee's Passport Application.

Appellee urges that appellant's Exhibit B, "Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong" supports appellee's contention that "the delay in processing his case was unreasonable" (Br. 11).[1] In the course of his argument appellee indicates that Exhibit B makes the following statement: "By July 1, 1951, this backlog had been reduced from 3600 to 2100 cases, some 600 of which were not 'live' " (Br. 12). However, Exhibit B actually states as follows: "By July 1, 1951, the backlog of pending cases *antedating September 1, 1950* had been reduced to ap-

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[1]"Br." indicates references to the Brief for Appellee.

proximately 2100 cases, not all of which were 'live', however, since in some 600 of them there was no means of communicating with the claimants . . ." [Ex. B, p. 3; Emphasis added]. The difference between the two statements is significant. Undoubtedly, a large number of claims were pending as of July 1, 1951 which had been filed between September 1, 1950 and July 1, 1951; since during this period cases were "still coming in at the rate of approximately 150 per month" [Ex. B, p. 3]. The actual statement contained in Exhibit B completely vitiates appellee's argument.

The statistics set forth in the Affidavit of Thurston Francis Waterman,[2] who was from April, 1948 to April, 1955, Chief of Section, Foreign Branch, Passport Office, Department of State, clearly demonstrates the inaccuracy of appellee's position. This affidavit discloses that as of July 1, 1952, 1891 claims were pending (p. 6). One of these claims was that of appellant, since his passport application was filed on May 13, 1952. However, 1179 of the claims pending on July 1, 1952 had been initiated prior to January 1, 1952 (p. 7) and were certainly entitled

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[2]To clarify Exhibit B, which is a part of the record, appellant during oral argument moved this Court to judicially notice the administrative conditions existing at the American Consulate General at Hong Kong, as supplemented by the affidavit of Thurston Francis Waterman, and presented this affidavit as an aid to the Court. This affidavit presents more detailed statistics concerning the "backlog" in citizenship claims pending at the Consulate during the pertinent times involved than does Exhibit B. These supplemental conditions are a proper subject of judicial notice, as illustrated by the following cases:

N. L. R. B. v. E. C. Atkins Co., 331 U. S. 398, 406 (1947), where the Supreme Court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The Court said (p. 406, fn. 2):

> "Circular No. 15 was not introduced into evidence in the proceedings before the Board. But it was issued by military

to preference over appellee's application. In addition, those claims instituted between January 1, 1952 and May 12, 1952, which antedated appellee's passport application, and which may be roughly computed at 481,[3] should be considered. Thus, as of July 1, 1952, approximately 1660 claims were entitled to a priority over the claim of appellee. Since between July 1, 1952 and December 23, 1952, 577 claims were processed (p. 6); to urge that the failure to complete appellee's claim during this period constituted an unreasonable delay is equivalent to

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authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it . . ."

Stainback v. Mo. Hock Ke Lok Po, 336 U. S. 368, 375 (1948): where the Court judicially noticed a practice in the administrative office of the United States Courts; *Ponce v. Roman Catholic Church,* 210 U. S. 296, 309 (1908), where the Court took judicial notice of the history of Porto Rico and its legal and political institutions up to the time of its annexation to the United States.

Other cases where judicial notice was taken are: *Ex Parte Milligan,* 4 Wall (71 U. S.) 2, 121 (1866): that in Indiana the Federal authority was always unopposed, and that its Courts always open to hear criminal accusations and redress grievances; *Hunter v. Wade,* 169 F. 2d 973, 976 (C. A. 10, 1948), aff'd 336 U. S. 634: that the armed forces of the United States engaged in the prosecution of the war in the European theatre were moving rapidly and that conditions in the field were more or less fluid; *De Witt v. Wilcox,* 161 F. 2d 785, 787 (C. C. A. 9, 1947): the extraordinary difficult and diverse problems confronting General De Witt in his protection of the 1500 miles of Pacific Coast waters and adjacent areas in California, Oregon and Washington during the war.

See also *Shapleigh v. Mier,* 299 U. S. 468, 474-475 (1937), where Justice Cardozo intimates that it is not only proper, but necessary, that an appellate court be furnished extrinsic aids, such as the affidavit presented to this Court, as a prerequisite to its taking judicial notice.

[3]Between January 1, 1952 and June 30, 1952, 722 claims were initiated (p. 6). Assuming that during each month of this six-month period an equal number of claims was initiated, and assuming for purposes of computation that appellee's passport application was filed on May 1, 1952 instead of the later date of May 13, 1952, 481 of the 722 claims would have been filed before that of appellant.

demanding an unwarranted preference in his favor. (Compare: *Wong Dick Wing v. Dulles,* 140 Fed. Supp. 261 (S. D. N. Y., 1956), where a period of 16 months and 12 days elapsed between the date plaintiff's affidavit-application was filed on August 7, 1951, and the date his action was commenced on December 19, 1952.)

II.

The District Court Erred in Denying Appellant's Motion for a New Trial.

A. Appellant Acted With Reasonable Diligence.

Appellee's contention that appellant did not act with reasonable diligence in securing the evidence supporting his motion for a new trial (Br. 16-18), when considered in conjunction with the large number of actions instituted under §503 of the Nationality Act of 1940 immediately preceding its repeal and the judicial uncertainty which thereafter developed, is untenable. According to *Ly Shew v. Acheson,* 110 Fed. Supp. 50, 54-55 (N. D. Calif., 1953), reversed on other grounds sub. nom. *Ly Shew v. Dulles,* 219 F. 2d 413, a total of 1288 actions by children born abroad allegedly of American citizen parents were instituted. The Courts were also inundated with actions for declaration of nationality instituted by citizens who had allegedly expatriated themselves under §401 of the Nationality Act of 1940, 8 U. S. C. A. §801. In view of the fact that administrative action to compile the passport files relating to most of these plaintiffs was required, it does not appear unusual that the passport file relating to appellee was not received in the office of the United States Attorney for the Southern District of California until about March 19, 1954 [R. 43].[4] More-

[4]"R" refers to printed Transcript of Record.

ver, where an action has been instituted under §503 fter denial of a citizenship claim abroad, administrative ction must *thereafter* be taken on an application for a Certificate of Identity, provided such an application is iled. (See *Dulles v. Lee Ngan Lung,* 212 F. 2d 73, 76, n. 9 (C. A. 9, 1954).

Appellee has at all times since his Complaint was filed esided in Hong Kong, B. C. C. [R. 43]. For a conderable period after the repeal of §503, the District Courts were undecided as to whether they possessed uthority to compel the Department of State to issue Certificates of Identity to allow plaintiffs to come to he United States to prosecute their actions. (Compare: *Wong Fon Haw v. Dulles,* 114 Fed. Supp. 906 (S. D. N. Y., 1953); *Wong Bick Ling v. Dulles,* 119 Fed. Supp. 513 (D. C. Dist. Col., 1954); *Yee Gwing Mee v. Acheson,* 108 Fed. Supp. 502 (N. D. Calif., 1952); and *Eng v. Acheson,* 108 Fed. Supp. 682 (S. D. N. Y., 1952) with *Wong Yoke Sing v. Dulles,* 116 Fed. Supp. 9 (E. D. N. Y., 1953); *Lee Mun Way v. Acheson,* 110 Fed. Supp. 64 (S. D. Calif., 1953); and *Look Yun Lin v. Acheson,* 95 Fed. Supp. 583 (N. D. Calif., 1951).) With this conflict existing, the following statement contained in an affidavit in support of appellant's Motion for a New Trial acquires added significance [R. 43]:

> "* * * affiant did not know whether or not plaintiff would be issued a certificate of identity for the purpose of travelling to the United States to prosecute his action, as provided in Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. §903; nor did affiant know or believe at that time that the court would proceed to trial in the absence of the plaintiff."

It was not until May 4, 1954 that this Court apparently resolved the conflict in this circuit (*Dulles v. Lee Gnan Lung,* 212 F. 2d 73, 75-76 (C. A. 9, 1954), rehearing denied May 4, 1954; but see *Chin Chuck Ming v. Dulles,* 225 F. 2d 849, 853 (C. A. 9, 1955), where *Look Yun Lin v. Acheson, supra,* ordering the issuance of a certificate of identity was cited with approval).

Appellant relied upon the admissibility of the results of appellee's blood test contained in a duly authenticated passport file relating to him [Ex. A] until the decision of the Court below on March 1, 1955 in *Ong Hong Way v. Dulles,* Civil No. 13,379 [R. 44]. This reliance had a reasonable legal basis (see discussion of admissibility on pp. 24 and 25 of App. Op. Br.). Appellant's misapprehension of existing law (assuming that the reasoning of the District Court in *Ong Hong Way v. Dulles* is correct), does not indicate a lack of due diligence. By way of analogy, a motion for new trial itself may be predicated upon a controlling decision which the moving party failed to bring to the attention of the Trial Court (*Sulzbacher v. Continental Casualty Co.,* 88 F. 2d 122 (C. C. A. 8, 1937)) or upon a controlling decision rendered after the decision of the Trial Court (*United States v. Bank of America,* 51 Fed. Supp. 751 (N. D. Calif., 1943)).

B. The Evidence Supporting Appellant's Motion for a New Trial Was Admissible.

The fact that appellee's parents were bloodtested pursuant to court order does not render the results of these tests inadmissible in evidence; since in the absence of some valid constitutional objection, all relevant evidence will be considered by the Court, no matter how obtained.

(*Olmstead v. United States,* 277 U. S. 438, 466-469 (1927); *Joong Sui Noon v. United States,* 76 F. 2d 249 (C. A. 8, 1935); *United States v. Lee Hee,* 60 F. 2d 924 (C. C. A. 2, 1932); *United States v. Wainer,* 49 F. 2d 789 (W. D. Pa., 1931); *In re Dooley,* 42 F. 2d 562 (S. D. N. Y., 1930).) Appellant submits that appellee's parents who submitted to blood tests under a Court order made under the authority of Rule 35, Federal Rules of Civil Procedure, were deprived of no constitutional right; even though this Court thereafter held in *Fong Sik Leung v. Dulles,* 226 F. 2d 74 (C. A. 9, 1955) that Rule 35 did not authorize such order. Blood tests are in essence no different from the taking of fingerprints and may properly be used as a means of identification. The prick of a finger is not "conduct that shocks the conscience" as forced stomach pumping was found to be in *Rochin v. California,* 342 U. S. 165, 172, or a method "revolting to the sense of justice", as a tortured confession was held in *Brown v. Mississippi,* 297 U. S. 278, 286. Although dealing with state prosecutions in *Rochin* the Supreme Court specifically held that it did not bring into question modern methods and devices that did not "legalize force so brutal and so offensive to human dignity in securing evidence" as it found forced stomach pumping to be. Certainly the extraction of a few drops of blood from an ear lobe or a finger tip to obtain the necessary sample is neither brutal nor offensive. (See, Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence, 16 So. Cal. L. Rev. 161, at pages 168 and 171.)

Even if it be assumed that the constitutional rights of appellee's parents were violated, appellee is in no position to complain. *The constitutional protection against un-*

lawful searches and seizures is a personal right to be asserted only by the person whose rights were violated. (*Gibson v. United States,* 149 F. 2d 381, 384 (C. A. Dist. Col., 1945), cert. den. 326 U. S. 724; *Ingram v. United States,* 113 F. 2d 966, 967 (C. C. A. 9, 1940); *Lewis v. United States,* 6 F. 2d 222 (C. C. A. 9, 1925). See also: *Goldstein v. United States,* 316 U. S. 114 (1942); *Jeffers v. United States,* 187 F. 2d 498 (C. A. Dist. Col., 1950), affirmed 342 U. S. 48.)

The suppression rule, which is an exception to the general principle that relevant evidence will be considered no matter how obtained (*Olmstead v. United States, supra*) arose from a motion to compel the return of property wrongfully seized. Manifestly, a person, such as appellee here, *has no standing to seek the return of property in which he has no proprietary or possessory interest.* (*Shields v. United States,* 26 F. 2d 993, 996 (C. A. Dist. Col., 1928), nor to ask for the return of the property of a third person, *Kelleher v. United States,* 35 F. 2d 877, 879 (C. A. Dist. Col., 1929).) IT WAS HIS APPELLEE'S PARENTS' BLOOD THAT WAS TAKEN, NOT HIS!

Nor was there a violation of appellee's rights of privacy under the Fourth Amendment. Only a person whose privacy has been invaded can complain of illegal wire tapping (*Goldstein v. United States, supra*); and if a witness waives his privilege against self-incrimination under the Fifth Amendment and the Court requires him to answer, a party to the action cannot object. (*Morgan v. Halberstadt,* 60 Fed. 592 (C. C. A. 2, 1894), cert. den. 154 U. S. 511.) By the same token, appellee has no right to complain of the search (blood tests) of his parents, if it can properly be said that there was a search. The constitutional rights of appellee himself were not violated

when blood samples were obtained from him on August 12, 1955 [R. 52-57]. Even if the drawing of these samples comes within a constitutional prohibition; appellee does not contend that the samples were taken by force or against his will. (*Cf. United States v. Mitchell,* 322 U. S. 65, 69, 70 (1944); *Young v. Territory of Hawaii,* 163 F. 2d 490 (C. C. A. 9, 1947).)

Respectfully submitted,

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